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No. 75-1606

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLOUGHBY E. LACY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1) is not published (see 526 F. 2d 814).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on January 20, 1976, and a petition for rehearing was denied on April 5, 1976 (Pet. App. 4). The petition for a writ of certiorari was filed on May 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion to strike his brief and to "strike" his counsel of record, which petitioner filed after the court had affirmed his conviction.

2. Whether petitioner received the effective assistance of counsel at trial.

3. Whether petitioner's prosecution for failure to file income tax returns violated his Fifth Amendment privilege against compulsory self-incrimination.

4. Whether the trial court improperly denied petitioner the opportunity to prove that he was the subject of a discriminatory prosecution.

5. Whether the trial court properly instructed the jury on the element of willfulness.

STATUTE INVOLVED

Section 7203 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 7203, provides:

> Any person required under this title to * * * make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of willfully failing to file income tax returns for the years 1969, 1970, and 1971, in violation of 26 U.S.C. 7203. The trial court sentenced petitioner to a term of nine months' imprisonment and fined him $5,000 on one count, and suspended sentence and imposed a two-year period of probation with respect to the remaining two counts (Pet. App. 2; Tr. 400-401).[1]

[1] "Tr." refers to the trial transcript.

During the years at issue, petitioner was a dentist (Tr. 339) and realized gross income of $43,332.13 in 1969, $41,933.86 in 1970, and $47,856.84 in 1971 (Tr. 279-283). For 1969 and 1970 petitioner filed blank income tax forms 1040 showing no income or expenses, but to which were attached various documents attacking the tax laws and claiming his First Amendment right to petition the government for redress of grievances (Tr. 14-15, 26, 100, 320; Govt. Exs. 3 and 4). Petitioner filed no form for 1971 (Tr. 16). During the investigation, petitioner told the agents that filing tax returns would violate his Fifth Amendment rights and his oath to defend the Constitution against domestic and foreign enemies (Tr. 95-98). Petitioner refused to turn over his records unless he received assurances of immunity from prosecution. When no such assurances were forthcoming, petitioner did not provide access to his records (Tr. 110-111).

During the trial, the court rejected (Tr. 270, 296-297, 328-330) all attempts to establish the "motivation on the part of [petitioner] in doing what he did" (Tr. 326). Petitioner's offer with regard to motivation invoked "certain constitutional issues * * * among those being the First, Fourth, Fifth, and Ninth Amendments to the Constitution". Petitioner's counsel stated that, if permitted, petitioner would seek to show that his "motive in filing the returns as filed was his attempt to petition the government for redress of grievances" (Tr. 330), to protest the use of government money for the "support of corrupt foreign governments, illegal wars, expenditures resulting in the death and maiming of thousands of foreign citizens" (Tr. 328-329) and "the use of the taxpayers' dollars in supporting what he considers to be an overlarge and somewhat needless bureaucracy" (Tr. 329). At the conclusion of the trial, the court instructed the jury on the element of willfulness as follows (Tr. 375-376):

Willful in this context means that such a failure to file must have been deliberate, intentional and voluntary and not the result of some accident or innocent mistake or mere negligence. The law in this respect says that before someone can be guilty of a criminal offense for failing to file a timely tax return in the manner required, it must have been a willful failure, saving anything short of that for something other than criminal prosecution, only that which involves allegations of willful failure. And it is up to the government in this case to prove this willfulness as I have described it beyond any reasonable doubt. Willfulness in this sense involves an intentional disregard or disobedience of some legal requirement. * * * The question may be raised as to, well, what if a person failed to file a tax return, though required to do so, but he was doing so as a political protest or because he thought the income taxes were unconstitutional or for some other sincere reason, would that constitute an excuse? No. If the failure to file is deliberate, knowing, intentional and conscious and voluntary, then the mere fact that it may have been prompted by a sincere belief that the law is bad or that the law is unconstitutional or for some other reason will not be an excuse to excuse and do away with the act which the law prohibits and which the law makes a crime.

After some deliberations the jury asked the court, *inter alia*, for a further discussion of the element of willfulness (Tr. 387), and the court gave the following supplemental instruction (Tr. 389):

> The term willful as used in this statute means a voluntary, purposeful, deliberate and intentional failure to file the return as distinguished from, for example, an accidental failure, inadvertent failure, or even a negligent failure for some reason to file a return. A failure to act is willful if it is voluntary and purposeful with the specific intent to fail to do that which the law requires. That is to say with the purpose to disobey or disregard the law. If that be so, and is done purposefully and deliberately and intentionally, then it would be done willfully. The mere fact, if it be a fact, that someone does not like a law or thinks that some law is unconstitutional, does not make his failure to comply with its requirements something less than willful. Notwithstanding whether it is a good intent or bad intent, if it is a knowing disregard of a requirement of law and is done deliberately and intentionally, then it is a willful action or in this case in the context of this case a willful failure.

DISCUSSION

1. Petitioner argues (Pet. 11-22) that the court of appeals erred in denying his motion to strike his brief and to "strike" his counsel of record. But petitioner did not file such a motion until six days after his conviction was affirmed (see Pet. App. 1; Pet. 14, 31). Thus, in denying petitioner's motion, the court of appeals ordered that the record show "that appellant discharged his said retained counsel after the decision of his case on the merits" (Order of March 22, 1976). Until the filing of his motion, petitioner had not previously complained about the effectiveness of his counsel. The court of appeals therefore correctly denied his attempt to discharge his counsel after the affirmance of his conviction had been announced in order to obtain a second appellate review.

2. Petitioner also argues (Pet. 11-22, 30-31) that he did not receive effective assistance of counsel at trial. However, as in the case of his claim of ineffective

appellate counsel, he did not raise this point in the court of appeals until after the affirmance of his conviction. In the absence of an evaluation of this contention by the courts below, there is no present basis for review by this Court. As far as the record indicates, petitioner was ably represented by retained counsel of his choice. Indeed, if petitioner wishes to pursue the point, he can seek relief under 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Brown*, 476 F. 2d 933, 935 (C.A. D.C.); *United States* v. *Haywood*, 464 F. 2d 756, 763 (C.A. D.C.); *Powers* v. *United States*, 446 F. 2d 22, 24 (C.A. 5).

3. Petitioner further argues (Pet. 22-29) that his prosecution for failure to file income tax returns violated his Fifth Amendment privilege against compulsory self-incrimination. But in *United States* v. *Sullivan*, 274 U.S. 259, the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. In so holding, the Court observed that "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all" (274 U.S. at 263).

Sullivan therefore disposes of petitioner's Fifth Amendment claim. Although petitioner (Pet. 22-24) relies upon *Garner* v. *United States*, No. 74-100, decided March 23, 1976, that case does not support the proposition that prosecutions for failure to file tax returns may be barred by the Fifth Amendment. Indeed, in holding in *Garner* that tax returns in which the defendant had revealed himself to be a gambler were admissible in evidence in a prosecution for a gambling conspiracy, the Court reaffirmed "the continuing validity of *Sullivan*'s holding that returns must be filed" (slip op. 3, n. 3). Thus, while petitioner might have elected to

refuse to answer certain questions on the return, he could not lawfully refuse to file no return at all. See *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824.

4. Petitioner further argues (Pet. 42-52) that the trial court denied him the opportunity to show that he was the subject of discriminatory prosecution. However, petitioner did not advance such a claim prior to trial and it was therefore waived in the absence of a showing of good cause. See Rule 12(b)(1) and (f), Fed. R. Crim. P. Petitioner now suggests (Pet. 48-51) that he was rushed to trial and prevented from fully acquainting his attorney with the nature of his discriminatory prosecution claim. But he had ample time within which to bring the matter to the attention of his attorney; the indictment preceded the commencement of the trial by approximately 48 days. Moreover, the trial court did not err in foreclosing petitioner from exploring before the jury the reasons underlying the institution of his prosecution (see Tr. 271-272, 289). A claim of discriminatory prosecution that does not relate to the question of guilt or innocence is for resolution by the judge, not the jury. *United States* v. *Berrigan*, 482 F. 2d 171, 174-176 (C.A. 3).

5. Finally, petitioner argues (Pet. 3-4, 32-42) that the trial court erred: (1) in excluding evidence of his alleged motives for failing to file tax returns, and (2) in failing to instruct the jury that the element of "willfulness" requires the jury to find that the charged offense was committed in bad faith or was the result of an evil motive. Petitioner urges that the trial court's instructions with respect to willfulness and its exclusion of evidence of his motives conflicts with *United States* v. *Bishop*, 412 U.S. 346, and *United States* v. *Murdock*, 290 U.S. 389.

The trial court's instructions (see pp. 4-5, *supra*) on the element of "willfulness" are in accord with *Bishop* and *Murdock*. The Court held in *Bishop* that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors, observing that the "longstanding interpretation" of the "word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). In speaking of a single "longstanding interpretation," the Court made clear that the phrase "bad faith or evil intent" as used in *Murdock* (290 U.S. at 398) referred to nothing more than the bad purpose or evil motive that necessarily inheres in a voluntary, intentional violation of a known legal duty. The "bad faith or evil intent" formulation in *Murdock* did not concern the defendant's motive (*i.e.*, his reasons for acting); it was addressed to his intent or state of mind at the time of the proscribed act (*i.e.*, whether he intentionally and knowingly violated the law). Thus, proof of intentional wrongdoing is all that is required. *United States* v. *Hawk*, 497 F. 2d 365, 368 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *McCorkle*, 511 F. 2d 482, 485 (C.A. 7) (*en banc*), 423 U.S. 826; *United States* v. *Pohlman*, 522 F. 2d 974 (C.A. 8) (*en banc*), certiorari denied January 12, 1976, No. 75-483.[2]

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[2] *Murdock* involved a prosecution for willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give the requested information has been based upon a bona fide, though mistaken, belief that his refusal was justified by his constitutional protection against self-incrimination. Since the scope of that privilege had been uncertain at the time of the defendant's refusal to supply the information, the Court held that he was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. Thus, if the defendant had such a belief that he was constitutionally protected from complying with the summons, *i.e.*, that if in refusing to comply he was not violating a legal duty, his refusal was not willful. Moreover, unlike here, where petitioner could have tested his views by means of a refund suit, there was no way for the defendant in *Murdock* to test his belief that he did not have to comply with the summons other than refusing to obey it in the first instance. See *Maness* v. *Meyers*, 419 U.S. 449, 460-463.

Petitioner did not contend at trial that his failure to file returns had been based upon a good faith belief at the time of the offense that the Fifth Amendment privilege against compulsory self-incrimination permitted him to file no returns at all, or that he was unaware of his duty to file returns. To the contrary, his offer of proof (Tr. 328-329) consisted of his proposed testimony objecting to the various uses to which the revenues are put, his testimony that the incomplete return he filed was for the purpose of petitioning the government for redress of alleged grievances (Tr. 338), and an unspecific suggestion that petitioner sought to raise issues under the First, Fourth, Fifth and Ninth Amendments. The latter scattershot allegation, which appeared to relate to petitioner's purported effort to petition for grievances, was insufficient to constitute a bona fide claim of nonwillfulness, *i.e.*, that he believed in good faith that he was not obligated to file a return.

Thus, however sincere petitioner's beliefs that the income tax laws are unconstitutional or that federal tax monies are being misspent, the trial court correctly instructed the jury that petitioner's asserted beliefs could not negate the element of willfulness if he voluntarily and intentionally violated a known legal duty prescribed by the tax statutes. If "good motive" were a defense to a criminal tax prosecution, a person such as petitioner, who voluntarily and knowingly committed a criminal tax offense,

might nevertheless avoid conviction by asserting that he acted in order to protest an illegal and immoral war (see *United States* v. *Malinowski*, 472 F. 2d 850, 855 (C.A. 3), certiorari denied, 411 U.S. 970); to protest the withholding of income tax from the wages of workmen (*United States* v. *Smith*, 487 F. 2d 329, 330 (C.A. 9), certiorari denied, 416 U.S. 989); to avoid disclosure of his identity to others (see *United States* v. *Matosky*, 421 F. 2d 410, 411 (C.A. 7) certiorari denied, 398 U.S. 904); or to protest a particular government expenditure.

The trial court's instructions therefore correctly distinguished between intent, which is at the heart of the concept of willfulness, and motive, which is irrelevant to the traditional criminal standard of willfulness. However, in *United States* v. *Pomponio*, 528 F. 2d 247, the Fourth Circuit reversed a conviction for willful filing of a false income tax return on the ground that the trial court's instruction to the jury, *i.e.*, that good motive alone is never a defense where the act done or omitted was a crime, was contrary to *Bishop* and *Murdock*. That court concluded (528 F. 2d 249) that *Bishop* "* * * requires a finding of bad purpose or evil motive" and that "excluding good motive from the consideration of the jury in a [criminal tax case] is inconsistent with *Bishop*."

Since the trial court's instructions in this case were similar to those disapproved in *Pomponio*, there is an apparent conflict between the decision below and *Pomponio*, in which we have filed a petition for a writ of certiorari (No. 75-1667). We therefore do not oppose certiorari with respect to the questions in the petition relating to the trial court's instructions as to "willfulness" and its exclusion of evidence of petitioner's motivation in failing to file tax returns (Pet. 3-4, Questions 3 and 5). However, the Court may deem it appropriate to hold this case pending its ultimate disposition of *Pomponio*.

CONCLUSION

For the reasons stated this case should be held pending the disposition of *United States* v. *Pomponio* (No. 75-1667).

Respectfully submitted.

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